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A local labor union, an affiliate of the Teamsters Union, filed a petition with the National Labor Relations Board (the Board) pursuant to Section 9(c) of the National Labor Relations Act (NLRA) seeking to represent the employees of a moving and storage company. At a pre-election hearing conducted pursuant to Section 9(c)(1) of the NLRA, the employer argued that the union should be disqualified from seeking certification because it engaged in "invidious discrimination" against women and Spanish-speaking and Spanish-surnamed persons. The Board held that it will entertain the employer's motion at a post-election hearing, and then only if the allegedly discriminatory union wins the election. Most significantly, the Board in dictum indicated that certification of a union known to engage in discriminatory practices would constitute governmental action in violation of the due process clause of the fifth amendment to the United States Constitution. Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974).

Victims of employment discrimination ordinarily may choose their remedy and the forum in which to pursue it from a wide range of possibilities. Employees represented by a union acting as an exclusive

2. Id. § 159(c)(1). A labor organization seeking certification as the exclusive bargaining representative of employees in a bargaining unit under § 9(a) of the NLRA must file a petition requesting an election. The Board investigates the petition, and, if it determines that there is reasonable cause to believe that a question affecting commerce exists, schedules a hearing. The hearing is normally restricted to a consideration of two issues: (1) whether there is a question of representation affecting commerce; and (2) whether the employees in the bargaining unit share economic interests which make a single representative appropriate. If the Board concludes a question of representation affecting commerce exists, it directs an election within the appropriate unit and certifies the winner as the exclusive bargaining representative of the employee unit. See NLRA §§ 9(a)–(e), 29 U.S.C. §§ 159(a)–(e) (1970).
bargaining representative under Section 9(a) of the NLRA have basically two alternative remedies for relief from discriminatory treatment in the negotiation or administration of a collective bargaining agreement: (1) an action for breach of the union's statutory duty of fair representation in federal district court; or (2) an action for the union's unfair labor practices under Sections 8(b)(1)(A), 8(b)(2) and 8(b)(3) of the NLRA. Neither of these remedies prevents the union from continuing to act as the exclusive bargaining representative of all employees, union and nonunion alike, in the bargaining unit. In *Bekins*, the Board added a third possible remedy by holding that an employer, in asserting employees' rights, can prevent a union engaging in known discriminatory practices from obtaining Board certification as an exclusive bargaining representative.

This note will examine the Board's belated recognition of its constitutional responsibility not to encourage or sanction racial discrimination by certifying labor unions which practice invidious discrimination. Although the Board adopted a post-election hearing procedure to discharge its constitutional obligations, its inability or unwillingness to define the degree of discrimination which warrants union ineligibility for certification suggests the new remedy will rarely be successfully invoked. Finally, the note will propose adoption of a modified version of Title VII standards to enable the Board to dispose expeditiously of the employer's charges without unduly disrupting the representation process.

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5. Another alternative remedy suggested by the Board in Pioneer Bus Co., 140 N.L.R.B. 54 (1962), decertification, is seldom invoked. Independent Metal Workers, Local No. 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); see notes 37-39 and accompanying text infra.
6. In *Bekins*, it was the employer who raised the charge of union racial discrimination. Possibly the Board would permit the employees to intervene as interested parties. Cf. 29 C.F.R. § 102.65(b) (1974) (pre-election procedures). For a discussion of whether an employer has standing to assert the constitutional rights of its employees, see Leslie, *Governmental Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 ARIZ. ST. L.J. 35, 38-47.
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I. BACKGROUND

A. Unions and Employment Discrimination: Duty of Fair Representation

In the landmark case, *Steele v. Louisville & Nashville R.R.*, the United States Supreme Court, construing the Railway Labor Act to avoid constitutional problems, held that the Act imposed an implicit duty on the union to represent fairly all employees in the bargaining unit, whether union members or not. The Court reasoned that since under the Act the union was accorded the exclusive right to represent the employees, the union must also be deemed to have assumed “a duty to protect equally the interests of the members of the craft . . . .”

The extension of the duty of fair representation to cases arising under the NLRA was implicit in the Court's summary disposition of a companion case to *Steele*, and was later explicitly extended to exclusive bargaining representatives under the NLRA. The limitations of the doctrine were identified in *Oliphant v. Brotherhood of Locomotive Firemen*, in which the Court of Appeals for the Sixth Circuit held that a union's discriminatory membership policy was not a per se violation of its duty of fair representation. Although the decision has been severely criticized, the court correctly concluded that legisla-

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9. An examination of the legislative history of the NLRA, read in conjunction with Justice Murphy's concurring opinion in *Steele*, id. at 208 (which would have rested the decision on constitutional grounds), supports an argument that in order to avoid the more difficult constitutional question, the Court read an implicit statutory duty of fair representation into the Act.
10. Writing for the majority, Chief Justice Stone concluded:
We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the powers conferred upon it in behalf of all those for whom it acts without hostile discrimination against them.
*Id.* at 202-03.
11. *Id.* at 202.
16. 262 F.2d at 361.
tive history\textsuperscript{17} indicated Congress did not intend to interfere with the freedom of unions to prescribe their own membership policies.\textsuperscript{18}

The duty of fair representation has not provided a workable solution to the problem of racial discrimination among union bargaining representatives. As the Court recognized in \textit{Steele}, the union must be allowed some discretion in negotiating the terms it considers will be most beneficial to the majority of members in the bargaining unit. Variations in terms of employment among members do not per se violate the duty of fair representation unless the variations are based on race alone or are "obviously irrelevant and invidious."\textsuperscript{19}

Courts, faced with the problem of adequately protecting employees from union abuse of its power as bargaining representative without crippling union exercise of discretion and flexibility in bargaining with the employer, have defined the duty of fair representation in broad generalizations. The \textit{Steele} formulation, which imposed a requirement of "good faith" bargaining,\textsuperscript{20} interposed a subjective test of motive, a standard hopelessly inadequate to measure group decisionmaking. A union may decline to process an employee's grievance, for example, due to: (1) limited financial resources; (2) a belief that the claim is

\textsuperscript{17} See, e.g., 93 CONG. REC. 4193 (1947): "Mr. Taft: ... let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so...."

\textsuperscript{18} NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), provides:

It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the rights of a labor organization to process its own rules with respect to the acquisition or retention of membership therein.

However, as the Trial Examiner noted in his Intermediate Report in Hughes Tool Co., 147 N.L.R.B. 1573, 1601 (1964):

[T]his proviso goes only to the Union's freedom from liability under Section 8(b)(1)(A) and sheds no light on its right to representative status or certified status under Section 9 .... Whatever may be the bases on which a statutory representative may properly exclude applicants, it seems clear to me that the bases must bear a reasonable relation to the union's role as bargaining representative or to its functioning as a labor organization; manifestly, racial discrimination bears no such relationship.

Practical considerations suggest that union denial of membership to blacks or other minorities will inevitably be followed by discrimination against such persons in the negotiation and administration of the collective bargaining agreement. Not only are the minority workers generally outnumbered, but their exclusion from union membership bars their participation and input into union decisionmaking.


\textsuperscript{19} 323 U.S. 192, 203 (1944).

\textsuperscript{20} \textit{Id.} at 204.
unmeritorious—both of which may be permissible;\textsuperscript{21} or (3) for reasons of racial discrimination. Unless the union is so careless as to identify an impermissible motive such as racial discrimination, the Steele “good faith” standard, coupled with the strong judicial presumption of regularity in union decisionmaking,\textsuperscript{22} effectively insulates the union from liability for all but the most egregious conduct.\textsuperscript{23}

Subsequent elaborations of the doctrine are equally unhelpful. In Humphrey v. Moore,\textsuperscript{24} the Court stated that the duty of fair representation required a union to act “honestly, in good faith and without hostility or arbitrary discrimination”;\textsuperscript{25} the union’s decisions must be based “upon relevant considerations.”\textsuperscript{26} In the most elaborate discussion of the duty of fair representation to date, Vaca v. Sipes,\textsuperscript{27} the Supreme Court declared that “a breach of the statutory duty of fair representation occurs only when a union’s conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.”\textsuperscript{28} Such a formulation is too blunt a judicial instrument to ferret out sophisticated forms of racial discrimination.

Despite the continuing availability of the duty of fair representation as a weapon in deterring union abuse of its power as exclusive bargaining representative, the doctrine has been invoked infrequently by victims of racial discrimination for several reasons.\textsuperscript{29} In actions brought to assert the duty of fair representation, defense attorneys have utilized procedural technicalities and drawn out appeals to delay court action and enforcement.\textsuperscript{30} In the field of employment discrimination, a delay in remedial action often amounts to a denial of re-

\begin{itemize}
\item \textsuperscript{21} Cf. Vaca v. Sipes, 386 U.S. 171 (1967).
\item \textsuperscript{22} Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); Pellicer v. Brotherhood of Railway & Steamship Clerks, 217 F.2d 205, 206–07 (5th Cir. 1954); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1339–43 (1958).
\item \textsuperscript{24} 375 U.S. 335 (1964).
\item \textsuperscript{25} Id. at 350.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} 386 U.S. 171 (1967).
\item \textsuperscript{28} Id. at 190.
\item \textsuperscript{29} M. Sovern, Legal Restraints on Racial Discrimination in Employment 155 (1966) [hereinafter cited as Sovern].
\item \textsuperscript{30} See, e.g., Marshall v. Central of Georgia Ry., 268 F.2d 445 (5th Cir. 1959); Pellicer v. Brotherhood of Ry. & S.S. Clerks, 217 F.2d 205, 206 (5th Cir. 1954).
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lief. Since the duty of fair representation is a judicial creation, there are no statutory provisions allowing recovery of attorney fees or back pay. Thus, the cost and delay of litigation falls squarely on those least able to afford it—the minority workers.

The Board has utilized the duty of fair representation to prevent union abuse of its power as exclusive bargaining representative, notwithstanding the fact that Congress, when considering the NLRA, specifically rejected the Board as a federal substitute for a fair employment practice commission. In Pioneer Bus Co., for example, the Board held that violation of a union's duty of fair representation would be grounds for decertification. Despite the Board's repeated assertion of its power to decertify, however, certification has been revoked only rarely. Ordinarily, the Board dismisses the charges for "insufficient evidence."

32. See note 9 and accompanying text supra.
36. Several unsuccessful attempts were made to amend both the NLRA and the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1970), to provide a measure of equal employment opportunity. Congressman Powell proposed an amendment to the Landrum-Griffin Act which provided:

[No] labor organization shall discriminate unfairly in its representation of all employees in the negotiation and administration of collective bargaining agreements or refuse membership, segregate or expel any person on the grounds of race, religion, color, sex or national origin.

2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT 1648 (1959). Similar amendments were proposed by Congressman Marcanonio, 1 id. at 706-07, and the American Civil Liberties Union. 2 id. at 3635. See generally Albert, NLRB-FEPC? 16 VAND. L. REV. 547, 549-53 (1963).
37. 140 N.L.R.B. 54 (1962).
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The Board has also checked union abuse by holding, in *Miranda Fuel Co.*, that violation of the duty of fair representation constitutes an unfair labor practice. Although denied enforcement by the Court of Appeals for the Second Circuit, the Board's *Miranda Fuel* doctrine was subsequently upheld by the Fifth Circuit court in *Local 12, United Rubber Workers v. NLRB.* The advantages of an unfair labor practice proceeding over an action in federal district court are primarily three: simplicity (any person may file an unfair labor charge), speed and convenience. The charging party, however, is limited by the General Counsel's unreviewable discretion to initiate a formal complaint. Once proceedings have been initiated, the *Miranda Fuel* approach has the salutory effect of shifting all costs of litigation to the Board. A countervailing consideration is that this approach does not prevent a union with a history of unfair representation of minority workers from seeking and enjoying the economic and political power it wields as exclusive bargaining representative. Despite the availability of these weapons against discrimination, the Board's performance in this area has been sporadic and inconsistent.

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41. *Id.*

42. 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). The court reasoned that the employees, in selecting an exclusive bargaining representative, effectively surrendered their right to bargain collectively with the employer (otherwise guaranteed under § 7 of the NLRA) to the bargaining representative. The union's summary refusal to process a meritorious grievance destroyed plaintiff's only remedy for vindicating his § 7 rights. The union's conduct thus violated § 8(b)(1)(A) of the NLRA.


46. The Board's achievements in the area of racial discrimination have been characterized as "a facade of lofty sentiments," but its record is one of "distinctly minor achievement, characterized by numerous temporizations with seemingly basic principles of democracy." Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 424, 445 (1949), *quoted with approval*, Trial Examiner's Intermediate Report, Hughes Tool Co., 147 N.L.R.B. 1573 (1964). *See also* notes 29–31 *supra*.

B. Mansion House: A New Role for the Board

The decision of the Court of Appeals for the Eighth Circuit in \textit{NLRB v. Mansion House Center Management Corp.}^{48} prescribes an active role for the Board in implementing the national policy against racial discrimination in employment.^{49} In \textit{Mansion House}, the employer, charged with a violation of Section 8(a)(5) of the NLRA,^{50} defended its refusal to bargain by claiming that the labor union followed discriminatory membership practices. The Eighth Circuit court denied enforcement of the Board's bargaining order, holding the remedial machinery of the NLRA and judicial enforcement by the court of appeals could not, consistently with constitutional guarantees of due process and equal protection, be utilized by a racially discriminatory union.^{51} The court remanded the case to the Board and, relying on Title VII standards and definitions of discrimination, directed the Board to admit the employer's statistical data of racial imbalance as prima facie evidence of discrimination.^{52} The court also forbade Board reliance on the union's passive good faith assurance of fair representation of members of the bargaining unit: "When evidence suggests discrimination of [sic] racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices."^{53}

Although the Board acknowledged its constitutional obligations in \textit{Bekins},^{54} it rejected the Eighth Circuit court's invitation to incorporate Title VII standards into its definitions of invidious discrimination. Its own conception, however, of its proper role in deterring racial discrimination among union bargaining representatives is vague and unsatisfactory.^{55}

II. THE BOARD'S REASONING IN \textit{BEKINS}

Notwithstanding the Board's acceptance of the Eighth Circuit court's declaration that Board certification of a discriminatory union

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48. 473 F.2d 471 (8th Cir. 1973).
51. 473 F.2d at 473–75.
52. Id. at 477.
53. Id. The Board did not seek certiorari or certification in \textit{Mansion House}.
55. See Part III-C-1 infra.
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is state action, the members were hopelessly divided on the proper role the Board should assume in disqualifying discriminatory unions from seeking and holding certification as exclusive bargaining representatives. Apparently confusing a union's duty to fairly represent members of its bargaining unit with the Board's own duty not to certify a discriminatory union, the plurality in *Bekins* declared the duty of fair representation constitutionally, as well as statutorily, rooted.

The Board indicated the employer's charges of race and sex discrimination by the union would be investigated in a post-election hearing in which the Board would determine whether the union's "propensity for unfair representation" would require a denial of Board certification to the victorious union.

*Bekins* reflects a conscious policy choice on the part of the Board to subordinate labor policy as expressed in the NLRA, which encourages prompt certification to guarantee workers the right to designate a bargaining representative, to the Board's duty not to sanction union discrimination. The Board fails to articulate any standard by which to measure a union's propensity for unfair representation; in fact, the Board explicitly reserved the question of what degree of invidious dis-

56. 86 L.R.R.M. at 1325.
57. *Id.* at 1326. As both the concurring and dissenting opinions correctly point out, *id.* at 1330-31, 1332 respectively, the duty of fair representation is statutory in origin. See note 9 and text accompanying notes 8-11 *supra.*

Moreover, regardless of whether the duty of fair representation is viewed as constitutional or statutory in origin, reliance on it to justify the utilization of a post-election precertification hearing is misplaced. The duty of fair representation governs the relationship between a union as bargaining representative and members of the bargaining unit; it does not determine the Board's constitutional duty not to certify discriminatory unions.

58. 86 L.R.R.M. at 1326.
60. The Board has consistently asserted its jurisdiction over cases involving racial discrimination when such discrimination threatens to interfere with employee rights guaranteed under § 7, and to impede national labor policy. See note 36 and accompanying text *supra.*

crimination warrants union disqualification from Board certification. The plurality chose to adopt a case-by-case approach:

to determine whether the nature and quantum of the proof offered sufficiently shows a propensity for unfair representation as to require [the Board] . . . to take the drastic step of declining to certify a labor organization which has demonstrated in an election that it is the choice of the majority of employees.

The Board indicated it would not “regard every . . . alleged violation of Title VII . . . as grounds for refusing to” certify a union.

The division of opinion among members of the Board over the proper scope of precertification inquiry into union discrimination, the recent change in the composition of the Board, and the Board’s reluctance to impose the “draconian” remedy of withholding certification for every alleged violation of Title VII, together with its demonstrated lack of success in implementing its Pioneer Bus doctrine, suggests the new remedy will seldom if ever be successfully invoked.

III. SOME PROBLEMS AND IMPLICATIONS OF BEKINS

A. Certification as Governmental Action

1. The state action doctrine—the general rule

The limitations imposed by the due process clause of the fifth amendment to the United States Constitution, and the due process

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and equal protection clauses of the fourteenth amendment, apply only to governmental action, not private conduct.\footnote{See Bolling v. Sharpe, 347 U.S. 497 (1954).} Prior to certification as the exclusive bargaining representative of members in the bargaining unit, a labor union is a private organization\footnote{See, e.g., Moose Lodge No. 7 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883).} whose conduct, however morally reprehensible, is not subject to the constraints the federal constitution imposes on governmental action. Although the distinction between public and private conduct is often ambiguous, the Supreme Court has declined to provide a specific test to identify governmental action, preferring instead to rely on "shifting facts and weighing circumstances."\footnote{See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).}

The argument that Board regulation alone satisfies the governmental action requirement was considered, and rejected, by the Court of Appeals for the Seventh Circuit in \textit{Driscoll v. International Union of Operating Engineers, Local 139}.\footnote{NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 473 (8th Cir. 1973).} In \textit{Driscoll}, plaintiff challenged a union bylaw which required all members who desired to run for union office to sign an affidavit attesting they were not Communists, contending that extensive regulation of labor union activities by the NLRA constituted sufficient governmental action to subject the union bylaw requirement to the constraints of the first and fifth amendments. The court disagreed, reasoning that unions, although subject to extensive regulation under the NLRA, remain essentially private entities. Only if the regulation can be said to foster, encourage or affirmatively endorse the union activity will constitutional limitations apply.\footnote{See Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973), aff'd, 419 U.S. 345 (1974); Moose Lodge No. 7 v. Irvis, 407 U.S. 163 (1972); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952). In \textit{Jackson}, the Supreme Court rejected an argument that extensive regulation by the Pennsylvania Public Utility Commission of a privately owned and operated utility company constituted state action. Citing both \textit{Moose Lodge} and \textit{Pollak}, the Supreme Court emphasized that state regulation in and of itself, however extensive or detailed, is insufficient to constitute state action: It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state"}
2. Certification as a stamp of governmental approval

While the Board does not affirmatively endorse the winner of the representation election,\(^7\) certification is undeniably an indelible stamp of governmental approval.\(^7\) Certification of a discriminatory union has the practical effect of encouraging and sanctioning union discrimination in three ways: (1) it entrusts the union, as the exclusive bargaining representative, with the economic well-being and security of the employees;\(^7\) (2) it provides the union additional opportunities to perpetrate invidious discrimination among employees of the bargaining unit; and (3) it deters employees from seeking the aid of the Board in opposing such discrimination.\(^7\)

Board certification also grants the union certain well-defined statutory rights which can be vindicated in an unfair labor practice proceeding before the Board and enforced by a court of appeals.\(^8\) For example, negotiation of the terms and conditions of employment and administration of the collective bargaining agreement are determined exclusively by the bargaining representative and binding upon all members of the bargaining unit.\(^7\) No other union may represent the employees, nor may the employees bargain with the employer directly.\(^8\)

While employees may present grievances directly to the employer...
and have those grievances adjusted without the intervention of the bargaining representative, adjustment cannot violate the terms of the collective bargaining agreement then in effect.81 Thus, freedom of the employees to engage in concerted activities otherwise protected by Section 7 of the NLRA are severely curtailed.82 Moreover, the Board has held that, in the absence of a positive showing of bad faith, the employer may simply refuse to recognize a noncertified union, thereby forcing the union to either become certified under Section 9 of the NLRA or call a recognition strike.83 Finally, a certified union is protected for 1 year from another Board-conducted election, thus giving the union time to consolidate its position among the employees.84

Clearly, then, certification substantially strengthens both a union’s bargaining position with the employer and its control over the economic future of employees within the bargaining unit. The Board may not accord such tremendous power to a racially discriminatory union and remain faithful to the command of the due process clause of the fifth and fourteenth amendments.

B. Potential Employer Abuse of Precertification Challenges to Union Certification

The Board’s utilization of a post-election hearing in *Bekins* enables the employer to prompt the Board to investigate charges of union racial discrimination without convincing the General Counsel to act, an advantage over the unfair labor practice charges required under the *Miranda Fuel* approach.85 However, since representation elections are not directly reviewable by a court of appeals86 and may only be challenged in federal district court in limited and extraordinary circum-

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81. NLRA § 9(a), 29 U.S.C. § 159(a) (1970); see Black Clawson v. International Ass’n of Machinists, 313 F.2d 179 (2d Cir. 1962). The bargaining representative must be given an opportunity to be present when any adjustments are made. *Id.*
82. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).
85. See note 45 and accompanying text supra.
stances, a precertification challenge to union eligibility of certification permits employers “opposed to dealing with their employees collectively” an opportunity to raise unfounded charges of racial discrimination to “delay and forestall the establishment of the collective-bargaining relationship.”

The Board attempted in *Bekins* to deal with the problem in a limited way. Stressing the need to conserve limited administrative resources, the Board chose to postpone consideration of the employer’s motion until after an election was held. Since unions are victorious in only about 50 percent of representation elections, this tactical delay reduces the Board’s potential number of hearings by one-half. Postponement of the hearing also prevents the employer from delaying the election and raising unfounded charges of discrimination intended to destroy the union’s credibility and disrupt the momentum of the union’s organizational campaign. Only the adoption of precisely delineated procedures governing the scope of inquiry and the

87. Leedom v. Kyne, 358 U.S. 184 (1958). In *Kyne*, the Supreme Court held that a federal district court has jurisdiction to invalidate a Board certification order only when made in excess of the Board’s authority in violation of an express prohibition in the NLRA. The *Kyne* exception has been narrowly construed. See, e.g., Local 1545, United Bhd. of Carpenters & Joiners v. Vincent, 286 F.2d 127 (2d Cir. 1960); National Maritime Union of America v. NLRB, 267 F. Supp. 117 (S.D.N.Y. 1967).

Should the Board certify a discriminatory union and the employer thereafter refuse to bargain, the employer can obtain indirect review of the certification order by defending its refusal to bargain on grounds that it has no duty to bargain with a discriminatory union. See NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973) (discussed in text accompanying notes 48–55 supra). On the other hand, if the Board refuses to certify a union, the union is essentially precluded from judicial review of that decision; although NLRA § 9(a), 29 U.S.C. § 159(a) (1970), requires the Board to certify the winner of a representation election, the courts have drawn a distinction between “statutory prohibitions and affirmative commands” and have refused to expand the *Kyne* exception to include instances in which the Board disregards the statutory directive to certify the union. *National Maritime Union*, supra at 121. As noted by another court:

[T]he *Kyne* exception to the general rule that district courts do not have jurisdiction ... does not extend to instances in which the Board refuses to certify, in spite of the positive language of section 9(c)(1) (29 U.S.C. § 159(c)(1)), because the command of that section lacks the clarity and specificity of the express statutory prohibition involved in *Kyne*.


89. *Id.*

90. *Id.* at 1327.


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quantity of discrimination necessary to bar a union from certification will likely be effective in deterring employer abuses.93

C. A Suggested Approach in Investigating Discriminatory Unions in a Post-Election Hearing

The Supreme Court has admonished the Board to interpret the provisions of the NLRA in light of sometimes conflicting requirements of other aspects of federal labor policy.94 Since elimination of racial discrimination is a matter of highest national priority,95 Bekins presented the Board a unique opportunity to heed the Court's admonitions and apply the Board machinery in a manner effectuating the purposes of both the NLRA and Title VII without unduly disrupting the certification process. However, despite the Eighth Circuit court's pointed suggestion in Mansion House that the Board develop "[p]rophylactic procedures . . . to deter pretextual refusal to bargain with an authorized unit on the alleged grounds that the union is practicing discrimination in its membership,"96 the Bekins Board pronounced itself "after much deliberation . . . not yet sufficiently experienced in this newly developing area of the law . . . to codify, at this time [its] approach to such issues, either procedurally or substantively."97

When the Board becomes "sufficiently experienced" to delineate its approach, it has three alternatives from which to choose:98 (1) the formula espoused by the Bekins plurality; (2) the approach of concurring member Kennedy; and (3) the Mansion House approach incorporating Title VII standards.

93. As previously noted, the Board declined to delineate procedures to govern its future consideration of discriminatory unions, and chose instead to proceed on a case-by-case approach. See text accompanying note 62 supra.

94. In Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942), the Court stated: [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.


96. 473 F.2d at 474.

97. 86 L.R.R.M. at 1327.

98. A fourth alternative, that espoused by the dissenters in Bekins, would deny the Board authority to withhold certification under any circumstance. This approach is untenable and should not be adopted. See note 64 supra.
1. The Bekins plurality formula

The plurality in *Bekins* chose to deny certification to a union which exhibits a "propensity for unfair representation." But the standard, as left undefined by the Board, is simply too vague. The plurality offered no guidance beyond stating that not every violation of Title VII will disqualify a union from certification. The plurality opinion suggests that utilization of the propensity-for-unfair-representation standard will require the Board to examine the probabilities that a union once certified will abuse its duty to fairly represent all employees in the bargaining unit. Since the duty of fair representation arises only after the union has assumed its responsibilities as bargaining representative, a union seeking certification has neither the authority nor the statutory obligation to represent the employees fairly or otherwise. To disqualify a union, which has won the support of a majority of the employees, on the mere presumption that the union will disregard its obligation to represent all employees fairly seems, at best, premature, and, at worst, arbitrary and unnecessarily destructive of the representation process. Another remedy, decertification, can be readily invoked if the employer's prophecies of discriminatory policies materialize and the union in fact violates its duty of fair representation.

2. The Kennedy approach

Member Kennedy, concurring in *Bekins*, would restrict the Board's inquiry to "those matters which [it is] . . . constitutionally required to entertain." Kennedy defined the Board's constitutional obligations as requiring only investigation of a union's membership and recruitment policies. While this approach has the merit of being simple to comprehend and relatively easy to administer, the Board's constitutional duty not to sanction racial discrimination does not end with an examination of a union's membership policies. To discharge its constitutional duty, the Board must investigate charges that the

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99. 86 L.R.R.M. at 1326. See also notes 8–10 & 57 and accompanying text supra.
100. 86 L.R.R.M. at 1326.
101. Id.
102. See notes 5 & 37–39 and accompanying text supra.
103. 86 L.R.R.M. at 1330.
104. Id.
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union: (1) discriminates in adoption or administration of seniority systems that perpetuate the past effects of discrimination;\textsuperscript{105} (2) fails to process meritorious grievances of minority employees;\textsuperscript{106} and (3) utilizes tests or other admission criteria which bear no relation to the requisite job skills and have a differential impact on minorities.\textsuperscript{107}

In short, the Kennedy approach would embroil the Board in constitutional litigation in which it has no expertise.\textsuperscript{108} To expect the Board to grapple successfully with these constitutional issues seems impractical and unnecessary.

3. Mansion House and Title VII standards

Adoption of the third and most desirable approach, that advocated by the Eighth Circuit court in \textit{NLRB v. Mansion House Center Management Corp.},\textsuperscript{109} would require the Board in evaluating a union's policies either to admit statistical evidence of racial imbalance between union membership and the surrounding community,\textsuperscript{110} or to regard union practices which have an adverse impact on minorities as prima facie evidence of discrimination.\textsuperscript{111} Evidence of such discrimination would create a rebuttable presumption of ineligibility for certification.

The Board currently uses a similar evidentiary approach when considering charges of employer discrimination under Section 9(a)(3) of the NLRA.\textsuperscript{112} When such charges are leveled against an employer, the


\textsuperscript{106} Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).


\textsuperscript{108} For the Board's confused handling of employer's charges of sex discrimination, see Bell & Howell Co., 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974).

\textsuperscript{109} 473 F.2d 471 (8th Cir. 1973).

\textsuperscript{110} \emph{Id.} at 477.

\textsuperscript{111} In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court listed the elements required to establish a prima facie case under Title VII. The complainant must establish: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Board must find: (1) whether the employer's conduct discriminates against some employees; and (2) whether such conduct discourages union membership.\footnote{113. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). In Great Dane, the Supreme Court indicated the instances in which proof of employer antionion motivation is also required to establish a § 8(a)(3) violation. The Court held that if the employer's conduct is: 'inherently destructive' of important employee rights, no proof of an antionion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antionion motivation must be proven to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Id. at 34. Once the Board introduces evidence of employer conduct which has an adverse impact on employee rights, the burden of proof shifts to the employer to justify the conduct by establishing a legitimate business purpose. Id.}

This two tier approach can be successfully utilized in the Board's post-election hearing under the Mansion House evidentiary standards. When applying these standards, the Board should hold that a single violation of Title VII is not sufficient to raise a presumption of discrimination, without further proof of an intent to discriminate.\footnote{114. Note, Labor Unions and Title VII: The Impact of Mansion House, 41 TENN. L. REV. 718, 731 (1974). Limited support for this assertion may also be found in the Supreme Court's rejection of the argument "that employer conduct violates § 8(a)(1) of the NLRA because it violates § 704(a) of Title VII . . . ." Emporium Capwell Co. v. Western Addition Community Organization, 419 U.S. 816, 829 (1975) (emphasis in original).}

However, isolated violations of Title VII are rare. Most often the union will engage in a policy of discrimination which both violates Title VII and interferes with employee rights. In such instances, once the employer introduces statistical evidence of racial imbalance or union conduct which has a differential impact on black employees, the burden of proof should shift to the union either to refute the presumption of discrimination by establishing a bona fide union purpose or to introduce evidence that affirmative steps have been taken to remedy the effects of past discrimination.\footnote{115. Judge Lindberg's ruling in United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash.), aff'd, 443 F.2d 544 (9th Cir. 1971), is a profitable illustration both of the utility of using statistical evidence in establishing racial discrimination and of ways that a union can refute the presumption of discrimination. In Ironworkers, the district court found that the unions, in conjunction with joint apprenticeship and training committees, had utilized a variety of techniques to prevent entry of black employees into the building and construction trades in the Seattle area. The court of appeals noted the following union practices: (1) the employment of tests and admission criteria which had little or no relation to on-the-job skills and which had a differential impact upon blacks, and which operated to exclude them from entrance into the unions or referrals to available jobs;}
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noted in *Griggs v. Duke Power Co.*, "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."116 Unless the union can satisfy this test, it should be disqualified from receiving Board certification.

Adoption of Title VII standards does have several drawbacks. First, there is the danger that the employer will raise unfounded charges of union discrimination to delay collective bargaining.117 Even if a charge is raised in good faith, inevitable administrative delays in conducting the hearing will result. The Board could minimize these difficulties, however, by adopting procedures to dispose of the charges expeditiously and thus reduce any disruption to the representation process.118

Second, the Board and the Equal Employment Opportunity Commission119 may find themselves reaching different results in similar cases. Moreover, as one commentator has warned, Board investigation of union racial discrimination may produce "inevitable confusion resulting from two independent agencies simultaneously defining, through decisions and guidelines, the contours of permissible behavior and will make it more difficult for those unions which try in good

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116. 401 U.S. 424, 431 (1971) (requirement of a high school diploma or passing of a standardized intelligence test as a condition of employment when neither standard is related to job performance and both operated to disqualify blacks at a disproportionately higher level than whites is a discriminatory employment practice.)

117. See Part III-B supra.


faith to comply with both.\textsuperscript{120} Notwithstanding such difficulties, concurrent jurisdiction in both the Board and the Equal Employment Opportunity Commission over problems of union racial discrimination is required if the Board is to discharge its constitutional duty under the fifth amendment.\textsuperscript{121}

Such confusion and possible development of inconsistent case law could be ameliorated if the Board exercises its rulemaking powers under Section 6 of the NLRA.\textsuperscript{122} The Board could not only set forth procedures for handling employer's charges, but also effectively define "propensity for unfair representation" and delineate the nature and quantum of proof required to disqualify a union from seeking certification. Rulemaking is especially appropriate in this area\textsuperscript{123} where the Board's propensity-for-unfair-representation standard is particularly vague. Unions and employers alike are entitled to rules which expound this vague formulation. The \textit{Bekins} Board's insistence on a case-by-case approach is unwarranted and unsound.

\section*{IV. CONCLUSION}

\textit{Bekins} raises two questions: (1) When should the employer's charges be investigated? (2) What degree of union discrimination warrants union disqualification from certification? The Board decided the first question in favor of a post-election, pre-certification hearing; it did


\textsuperscript{121} See Part II-A supra. It should be noted that denial of certification to the victorious union is not the most effective remedy in eliminating racial discrimination. However, so long as elimination of discrimination in employment remains a matter of highest national priority, the existence of numerous and somewhat overlapping remedies is defensible.

Professor Rosen has warned that denial of certification to unions which engage in known discriminatory practices may result in employees being without any representation whatsoever. Rosen, \textit{The Law and Racial Discrimination in Employment}, 53 CALIF. L. REV. 729 (1965). Furthermore, denial of certification will not affect the status of strong unions which wield sufficient economic power to force employers to the bargaining table absent certification. At best, withholding of certification will require only weak unions, when faced with the possibility of denial of certification, to abandon racist policies. \textit{Sovern.} supra note 29, at 60. \textit{See also Greenberg, supra} note 15, at 182–83.


\textsuperscript{123} Rulemaking procedures are designed to assure fairness, encourage input from all parties interested or affected by the Board's decision and consider all aspects of the problem before formulating a rule of general application. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).
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not reach the second question. Despite the Eighth Circuit court's recommendation in Mansion House that the Board promulgate procedures to prevent unfounded challenges to union authority and implement Title VII standards to measure union discrimination, the Board seems resolved to do as little as possible.

The greatest obstacle to effective Board action in dealing with racial discrimination among unions remains the attitude of the Board itself. Its reluctance to assert itself in this area is understandable perhaps, for when faced with the task of enforcing inconsistent policies, an administrative agency will naturally tend to enforce the policy involving its area of expertise. The Board historically has shown little enthusiasm for controlling racial discrimination among labor unions when such efforts would conflict with competing aspects of federal labor policy. By ignoring the Mansion House standard without substituting any clear standard in its stead, and by insisting on a time-consuming case-by-case approach to the problem in the face of its own complaints about rising caseloads and insufficient administrative resources, Bekins only confirms the Board's historical apathy for playing an active role in eliminating racial discrimination in employment.

Diane Rees Stokke

124. Enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d) et seq. (1970), which prohibits discrimination in programs receiving federal funding, has proven particularly unpopular among agencies whose primary purpose is disbursement of funds. Cutting off funds to a recipient who refuses to comply with Title VI requirements is antithetical to the agency's primary objective. See Comment, Title VI and the Civil Rights Act of 1964—Implementation and Impact, 36 Geo. Wash. L. Rev. 824 (1968); cf. Gautreaux v. Romney, 448 F.2d 731 (1971).
125. See notes 37–39 & 67 and accompanying text supra.